UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LARRY CROW, CIVIL NO. 06-3228 (PAM/JSM)

Plaintiff,

v. ORDER

WOLPOFF & ABRAMSON,

Defendant.

The above matter came on for hearing before the undersigned on November 28, 2006 upon Plaintiff's Motion to Strike Sixth Affirmative Defense [Docket No. 11]. Thomas J. Lyons, Jr., Esq. appeared on behalf of plaintiff; Jill N. Brown, Esq. appeared on behalf of defendant.

The Court, being duly advised in the premises, upon all of the files, records and proceedings herein, now makes and enters the following Order.

IT IS HEREBY ORDERED that Plaintiff's Motion to Strike Sixth Affirmative Defense [Docket No. 11] is granted.

Dated: April 19, 2007

s/ Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

MEMORANDUM

I. FACTUAL BACKGROUND

Plaintiff Larry Crow alleges that defendant Wolpoff & Abramson sent a notice of debt to him dated May 15, 2006. Complaint ¶ 9, Answer ¶ 9. Plaintiff disputed and requested validation of this debt in a letter dated June 22, 2006. Complaint ¶ 10. Defendant did not provide verification of the debt, but instead responded with a letter entitled "Notice of Intent to Sue" dated June 28, 2006. Complaint ¶ 11, Answer ¶ 11. As a result of this conduct, plaintiff asserted that defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA"), which requires debt collection to cease when properly challenged by a consumer.[1] Plaintiff seeks to hold defendant liable for proceeding with collection efforts after a timely validation request was submitted. Complaint ¶¶ 12, 15-16.

In its Answer, defendant asserted as an affirmative defense ("Sixth Affirmative Defense") the following:

> Plaintiff and Plaintiff's counsel's pursuit of Defendant is in bad faith and solely to harass and annoy, entitling Defendant to any award of attorney's fees, as well as their costs and disbursements incurred herein as sanctions, and that if Plaintiff and Plaintiff's counsel

[1] Section 1692g provides that within five days after initial communication with a consumer regarding collection of a debt, the debt collector must send the consumer a written notice containing the debt amount and name of the creditor. Additionally, the notice must include a statement indicating that the debt will be assumed to be valid unless the consumer writes within thirty days after receipt of the notice to dispute the validity of the debt. If a consumer notifies the debt collector that the debt is disputed within the thirty-day period, the debt collector must cease debt collection until verification of the debt is mailed to the consumer. See 15 U.S.C. § 1692g.

> continues to prosecute or further this litigation or fails to immediately dismiss this lawsuit, will be in violation of Fed. R. Civ. P. 11, 28 U.S.C. § 1927 and 15 U.S.C. § 1692k(a)(3) and will be liable for Defendant's attorneys fees and costs for multiplying the proceedings in this cases unreasonable and vexatiously, asserting claims solely to harass and annoy Defendant and in asserting claims contrary to the applicable law in this area.

Answer, Sixth Affirmative Defense.

Plaintiff has now moved to strike defendant's Sixth Affirmative Defense pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, on the grounds that it is insufficient as a matter of law and scandalous.

In response, defendant maintains that plaintiff and plaintiff's counsel acted in bad faith by proceeding with an FDCPA claim after submitting a "clearly and unequivocally untimely" validation request. See Defendant's Memo p. 1. In support of this contention, defendant stated that during its investigation of the Complaint, defendant's counsel requested information to support plaintiff's claim that he did not receive the May 15, 2006 letter until May 24, 2006. See Affidavit of Jill N. Brown ("Brown Aff.") ¶ 3. Plaintiff provided defendant with a calendar showing that he was at a job site from May 1 to May 17, 2006 and then was away from work between May 17, 2006 and May 31, 2006. See Brown Aff., Ex. A. From this information, defendant concluded that plaintiff was home to receive the May 15, 2006 letter between May 17 and May 31, 2006. See Brown Aff., ¶ 3. When defendant's counsel questioned plaintiff's attorney about the discrepancy, plaintiff's attorney stated that plaintiff did not actually receive the letter until after Memorial Day. Id. After receipt of defendant's Answer, plaintiff's attorney then demanded that defendant withdraw its Sixth Affirmative Defense. Id. at ¶ 4. In response, defendant's counsel sent a letter to plaintiff's attorney explaining that the allegation of bad faith stemmed from the appearance that plaintiff was home to receive the May 15, 2006 letter by May 17, 2006. Id.

In response to this letter, plaintiff's attorney sent defendant's counsel an e-mail to explain the delay. See Brown Aff. ¶ 4, Ex. B. According to the e-mail, plaintiff left his home in the Twin Cities to work in Thunder Lake, Minnesota on May 8, 2006. See Brown Aff., Ex. B. The e-mail went on to explain that after leaving the job site, plaintiff did not return home; rather he was at "his lake place," and he did not return home until after the Memorial Day weekend and was unable to check his mail because he was 200 miles from home. Id. Consequently, plaintiff's counsel clarifies the indeterminate "on or about" language from the Complaint, writing, "We now know it was May 30, 2006, after [Plaintiff] returned home from his cabin after Memorial Day weekend." Brown Aff., Ex. B; see also Complaint ¶ 9.

The issue before this Court is whether defendant's denial of plaintiff's allegation that he received the validation letter "on or about May 24, 2006" can serve as the basis for an affirmative defense, and if not, whether this Court will treat the Sixth Affirmative Defense as a counterclaim.

II. DISCUSSION

Rule 12(f) of the Federal Rules of Civil Procedure allows a court to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" from a pleading. Fed. R. Civ. P. 12(f). The Eighth Circuit has held that "motions to strike are viewed with disfavor and are infrequently granted." Stanbury Law Firm, P.A. v. I.R.S., 221 F.3d 1059, 1063 (8th Cir. 2000); Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977). Nevertheless, a motion to strike should be granted if "it may have the effect of making the trial of the action less complicated, or [it] may have the effect of otherwise streamlining the ultimate resolution of the action." United States v. Dico, Inc., 189 F.R.D. 536, 541 (S.D. Iowa 1999). The rule is stated in the permissive, and "it has always been understood that the district court enjoys 'liberal discretion' thereunder." Stanbury, 221 F.3d at 1063; see also Thor Corp. v. Automatic Washer Co., 91 F. Supp. 829, 832 (D. C. Iowa 1950) (holding the court has "liberal discretion" to strike any insufficient defense).

A. Legal Sufficiency of Defendant's Sixth Affirmative Defense

Rule 8(c) of the Federal Rules of Civil Procedure governs affirmative defenses. In addition to nineteen enumerated defenses, Rule 8(c) states that a party shall set forth "any other matter constituting an avoidance or affirmative defense."

> Rule 8(c) is a lineal descendent of the common law plea by way of "confession and avoidance," which permitted a defendant who was willing to admit that the plaintiff's declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat the plaintiff's otherwise valid cause of action.

5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1269 (3d ed. 2004). An affirmative defense should accept, rather than contradict, well-pleaded allegations of the complaint. Gwin v. Curry, 161 F.R.D. 70, 71 (N.D. Ill. 1995). Such matters are not raised by a negative defense. Instituto Nacional de Comercializacion Agricola v. Continental Illinois Nat'l Bank & Trust Co., 576 F.

Supp. 985, 988 (N.D. Ill. 1983). A true affirmative defense raises matters outside the scope of a plaintiff's prima facie case. See id. If accepted by the court, an affirmative defense will defeat an otherwise legitimate claim for relief. 2 Jeffrey A. Parness, Moore's Federal Practice § 8.07 (3d Ed. 1999).

Here, instead of accepting plaintiff's allegations and raising a separate matter that would defeat his claim, defendant's Sixth Affirmative Defense is, in essence, a denial of plaintiff's assertion that he received the debt notice on or after May 24, 2006. See Defendant's Memo pp. 3-4. Defendant's allegation of bad faith is premised on the notion that plaintiff's response to the validation letter was untimely, and that "[p]laintiff appears to have simply picked a date that would be within thirty (30) days of the date he sent his validation request on June 22, 2006." Id. at p. 3. In other words, if indeed the facts do support defendant's assertion that plaintiff received the debt notice before May 24, 2006, the validation request was untimely per the FDCPA. Conversely, if the facts support plaintiff's assertion that he received the debt notice on May 24, 2006 or later, his validation request was timely. A proper affirmative defense would assume that plaintiff received the debt notice on or after May 24, 2006, and then introduce other material to defeat some or all of the claim. Defendant's Sixth Affirmative Defense, however, disputes the factual basis of the Complaint, and as such, it is not an affirmative defense.

Defendant cites to Bartashnik v. Bridgeview Bankcorp, Inc., 2005 WL 3470315 at *5 (N.D. Ill. Dec. 15, 2005), to support the legitimacy of its Sixth Affirmative Defense. Although an affirmative defense alleging bad faith survived a motion to strike in Bartashnik, defendant's reliance on the case is misplaced. First, in preserving the affirmative defense, the Bartashnik court pointed out that the claim raised issues external to the proceedings.. Id. at *5. Here, the record before this Court establishes that the affirmative defense is simply a refutation of an allegation in the Complaint. Second, in striking a separate affirmative defense alleging improper venue in the same decision, the Bartashnik court stated, "affirmative defenses should not merely [negate] elements that a plaintiff must prove." Id.

Defendant's allegations of bad faith are not external to plaintiff's prima facie case. Instead, the allegations stem from a partial denial of the Complaint. Accordingly, defendant may not assert claims under Rule 11 of the Federal Rules of Civil Procedure, 15 U.S.C. § 1692k(a)(3), or 28 U.S.C. § 1927, as affirmative defenses under Rule 8(c).[2]

[2] Plaintiff also argues that defendant's Sixth Affirmative Defense should be stricken because it is scandalous. "The word 'scandalous' in Rule 12(f) 'generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court.'" Pigford v. Veneman, 215 F.R.D. 2, 5-6 (D.D.C. 2003) (quoting 2 Moore's Federal Practice § 12.37 (3d Ed. 2002)). To support his allegation that the Sixth Affirmative Defense is scandalous, plaintiff references a single case where a Rule 12(f) motion was granted, Bailey v. Clegg, No. 1:90-CV-2702-CAM, 1991 WL 143461 at *3 (N.D. Ga. June 14, 1991). See Plaintiff's Memo, 6. In Bailey, the court granted the plaintiff's motion to strike a 15 U.S.C. § 1692k(a)(3) affirmative defense. However, the affirmative defense was not stricken because it was scandalous. Id. Rather, the motion was granted on procedural grounds, and the court explicitly stated that it was not doing striking the allegations because they were "insufficient, irrelevant, immaterial and impertinent." Id. The court found that an affirmative defense was an improper avenue to seek attorney's fees and such allegations of bad faith should only be addressed after the defendant prevails on the merits. Id. Bailey indicates the legal insufficiency of defendant's Sixth Affirmative Defense, but it does nothing to support plaintiff's contention that the Sixth Affirmative Defense

B. Defendant's Request to Treat Its Sixth Affirmative Defense as a Counterclaim

Because its Sixth Affirmative Defense is not a proper affirmative defense under Rule 8(c), defendant asks this Court to treat it as a counterclaim. See Defendant's Memo pp. 4-5. A court may treat affirmative defenses as counterclaims as "justice so requires." Fed. R. Civ. P. 8(c). In the case of improper labeling between affirmative defense and counterclaim, "the court . . . shall treat the pleading as if there had been a proper designation." Reiter v. Cooper, 507 U.S. 258, 263 (1993). "[W]hen the defendant asserts a matter as a defense . . . that is legally insufficient to constitute an affirmative defense, but nonetheless could serve as an independent counterclaim, the district court may relabel the defense as a counterclaim." 5 Federal Practice and Procedure § 1275 (3d ed. 2004). Thus, defendant's request to treat its Rule 11, 28 U.S.C. § 1927 and 15 U.S.C. § 1692k(a)(3) claims as counterclaims rests upon the premise that they are independently sufficient to serve as counterclaims.

1. Rule 11 of the Federal Rules of Civil Procedure

Sanctions under Rule 11 of the Federal Rules of Civil Procedure are imposed to deter repetition of improper conduct, and may include "directives of a nonmonetary nature, an order to pay a penalty into court, or . . . an order directing payment . . . of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." A party seeking Rule 11

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improperly casts a "negative light" on plaintiff and plaintiff's counsel. See Plaintiff's Memo p. 6. In any event, because the Sixth Affirmative Defense is insufficient as a matter of law, this Court need not address plaintiff's contention that it should be stricken because it is scandalous.

sanctions must follow the procedure set forth in Rule (c)(1)(A): "A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision." Id. Consequently, a party may not seek sanctions in a motion "simply included as an additional prayer for relief contained in another motion." Fed. R. Civ. P. 11 advisory committee's note (1993 amendment). This limitation is not mere happenstance, but supports a compelling policy. "To assure efficient operation of the pleading regimen . . . the court must to the extent possible limit the scope of sanction proceedings . . . ." Id. It is for this reason that the court in Yash Raj Films (USA) Inc. v. Atlantic Video, No. 03 C 7069, 2004 WL 1200184 at *3 (N.D. Ill. May 28, 2004), after granting a motion to strike an affirmative defense that alleged an unspecified violation of Rule 11, refused to treat the defense as a counterclaim. The court held that a Rule 11 allegation of bad faith must be brought as a separate motion. Id.; cf. L.B. Foster Co. v. America Piles, Inc., 138 F.3d 81, 90 (2d Cir. 1998) (reversing the district court's order imposing sanctions because the party's request for Rule 11 sanctions was not brought as a separate motion, but was included in a letter requesting Rule 54(b) certification for judgment). Here, defendant did not file a separate motion seeking Rule 11 sanctions, but included the request in its Sixth Affirmative Defense.

Defendant refers this Court to Smith v. Wal-Mart Stores, No. C 06-2069 SBA, 2006 WL 2711468 at *14 (N.D. Cal. Sept. 20, 2006), to support its request that this Court designate its Sixth Affirmative Defense as a counterclaim. There, the court held that an affirmative defense seeking attorney's fees should be treated as a counterclaim because attorney's fees are "special damages" under Rule 9(g) of the Federal Rules of Civil Procedure. Id. The instant case is distinguishable. Wal-Mart did not raise a Rule 11 claim, but dealt with a general averment of bad faith by the plaintiff. See id. Rule 9(g)'s command that special damages shall be "specifically stated" does not obviate the procedural requirements of Rule 11 that a party must bring a Rule 11 claim for sanctions by a separate motion. Because it is procedurally insufficient, the Rule 11 claim in defendant's Sixth Affirmative Defense will not be treated as a counterclaim.

2. 15 U.S.C. § 1692k(a)(3) and 28 U.S.C. § 1927

Defendant requests that this Court treat its 15 U.S.C. § 1692k(a)(3) affirmative defense as a counterclaim. 15 U.S.C. § 1692k(a)(3) provides for reasonable attorney's fees and costs on a finding by the court that an FDCPA action was brought in bad faith and for purposes of harassment.

In Young v. Reuben, 2005 WL 1484671 at *1, (S.D. Ind. June 21, 2005), the court rejected an attempt by a defendant to bring a 15 U.S.C. § 1692k(a)(3) counterclaim. Rather than providing an independent grounds for relief, the court held that 15 U.S.C. 1692k(a)(3) creates a claim after a finding that plaintiff's case was brought in bad faith, which can only take place when the primary dispute is resolved. Id. Defendant's request that this Court treat its 15 U.S.C. § 1692k(a)(3) affirmative defense as an independent counterclaim must similarly fail. The question of plaintiff's bad faith and intent to harass defendant is contingent upon the timeliness of plaintiff's actions, a finding of fact which requires a resolution of the primary claim.

For the same reason, defendant's allegation that plaintiff is liable to defendant under 28 U.S.C § 1927 for attorney's fees and costs for "multiplying the proceedings in this case unreasonably and vexatiously" must be rejected. The question of whether plaintiff and his attorney engaged in actionable conduct under § 1927 is dependent on the outcome of suit, and as such, can only be determined after the primary dispute is resolved. A claim under § 1927 is not appropriate for a counterclaim.

III. CONCLUSION

For the foregoing reasons, plaintiff's Motion to Strike the Defendant's Sixth Affirmative Defense is granted.[3]

JSM

[3] In granting plaintiff's motion, the Court notes that defendant's pursuit of a Rule 11 motion for sanctions, or a claim of attorney's fees and costs premised on 15 U.S.C. § 1692k(a)(3) and 28 U.S.C. § 1927, is not foreclosed by this decision. See Instituto Nacional de Comercializacion Agricola, 576 F. Supp. at 988. "[A]s long as the pleading clearly indicates the allegations in the complaint that are intended to be placed in issue, the improper designation should not operate to prejudice the pleader." 5 Federal Practice and Procedure § 1269 (3d ed. 2004). Further, defendant's articulated fear of compulsory waiver is unfounded, where the claim is not an affirmative defense in the first place. "If the defense involved is one that merely negates an element of the plaintiff's prima facie case it is not truly an affirmative defense and need not be pleaded despite [R]ule 8(c)." Sanden v. Mayo Clinic, 495 F.2d 221, 224 (8th Cir. 1974) (internal citations omitted).